

## OUTLINE OF DRUG LAW ENFORCEMENT IN ITALY

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### DEVELOPMENT AND CURRENT FRAMEWORK OF DRUG LAW

Currently, Italian drugs legislation is contained in the *Consolidation Act on Regulation of Narcotic Drugs and Psychotropic Substances, Prevention, Care and Rehabilitation of Drug-Addiction, Presidential Decree No. 309/1990*. Even though the unitary structure of provisions, in the last decades, there followed several legislative actions and contradictory interpretative guidance of case law, leading also confusion on criteria of punishment and affecting overcrowding in Italian prisons.

The first notable reform of drug law was in the nineties, before the Consolidation Act, with the **Law No. 162/1990 (the so-called “Legge Iervolino-Vassalli”)**, when the Italian legislature introduced a *dual system of punishment* differentiating between drug usage and trafficking. Indeed, the criteria of a “tolerable daily intake” set forth in its average amount by the Decree of the Italian Health Ministry has marked the borderline between administrative and criminal violations. In other words, penalties for drug trafficking were increased, while the non-therapeutic use of drugs was prohibited only as an administrative offence whenever involved an amount less than the threshold required by the Ministerial Decree. However, the **referendum of April 1993** removed the criteria of the “tolerable daily intake”; as a result, a large discretion was given to the Courts in order to evaluate the purpose of drug possession unfettered by quantitative restrictions.

Afterwards, the opposite direction was assumed by the reform of 2005, enacted by the Italian Government with the **Law Decree No. 272/2005 (the so-called “Legge Fini-Giovanardi”)**. Among the most important changes, the law converted by the Parliament (No. 49/2006) *unified the penalty provisions* for those crimes regardless the type of substance, revoking the distinction between hard and soft drugs. Notwithstanding the Framework Decision 2004/757/GAI had expressly referred on the necessity to differentiate penalties with respect to the nature of drugs, Italian policies leaned toward a repressive approach in both the phenomena of use and trafficking of drugs, turning out to

be oriented more to security protection rather than health caring. The related increasing of penalties not only has aroused bewilderment with regard to the proportionality among sanctions concerning drugs, but also about the comparison with other criminal offences's punishment in the Italian law system. Furthermore, a *quantitative threshold* was introduced again to distinguish between criminal or administrative violation, waiving to take account subjective circumstances of action in order to discern between personal use of drugs and trafficking. The consequence of threshold applying has been to reverse the burden of proof in cases in which drug's quantity is higher, charging the defense to prove aim of personal use, namely innocence of the defendant, in breach of the due process rights.

Lastly, with the **Judgment No. 32/2014**, the **Italian Constitutional Court** struck down this reform on the grounds of procedural reasons, bringing reinstatement of the former law. The most important consequence has been to distinguish again among penalties, listing separately in two different *tables* hard and soft drugs. In addition, the provision of the *minor crime of tiny nature* has been interpreted (the so-called "*fatto di lieve entità*") as an independent crime, implementing a decriminalization purpose.

Thereafter, the Italian Government has attempted to bridge the regulatory gap caused by the judgment of the Constitutional Court, making certain amendments in penalty provisions and alternative sanctions to detention, as the *community service* (Law Decree No. 36/2014). Moreover, one of the most important amendments has concerned *remand* as pre-trial detention, excluding it for minor crimes concerning drugs. Finally, the Parliament converting into law (**Law No. 79/2014**) has set forth additional *alternative measures to detention* so that remarkably affecting the overcrowding status of the Italian prison system.

## CRIMINAL OFFENCES

**A) *Production and illegal trafficking of narcotic drugs and psychotropic substances* (Art. 73):** growing, production, manufacturing, extraction, refining, sale, offering or placing on sale, transferring or receiving, in any capacity, distributing, trading, transporting, supplying to other people, sending, giving or shipping in transit, delivering for whatever purpose or illegal possession, *outside the cases provided for in the Art. 75 (see administrative offences).*

### **Penalties:**

a) Table I and III (hard drugs) → imprisonment from 8 to 20 years, fine from 25.822 to 258.228 Euro

b) Table II and IV (soft drugs) → imprisonment from 2 to 6 years, fine from 5.164 to 77.468 Euro

c) Some aggravating and mitigating circumstances:

- In case of crime by committed by 3 or more people → sentence increased
- Involving of minor or drug user, promoting or managing, crime committed with arms, mixing of substances, sex reasons, drug offer into or close to schools, youth communities, prisons, hospitals... (see Art. 80) → sentence increased by one-third to half
- In case of huge amount of drugs (see Art. 80) → sentence increased by half to two-thirds, up to 30 years of imprisonment
- Acting in order to avoid additional repercussions, even effectively cooperating with police and judicial authority, as well as subtracting significant resources for crimes committing → sentence reduced by half to two-thirds

- **Legal presumptions**

Some conducts, such as *growing*, *transporting*, and *free supplying* are deemed as intrinsically linked with drug trafficking; this means it is not possible in any way to prove the aim of merely personal use during the trial. Hence, there are some hypothesis in which the personal use of soft drugs, like cannabis, is punished automatically as a criminal offence, despite of the lack of business purpose. This is the case of tiny domestic cultivations, or even the situation of who driving in drug possession is stopped by the police, as well as the fact of drug sharing for only socialization reasons.

**B) *Production and illegal trafficking of narcotic drugs and psychotropic substances: minor crime of tiny nature*** (so-called “*fatto di lieve entità*”, Art. 73, comma 5), for means, courses or circumstances of action, for quality or quantity of drugs.

**Penalties:**

a) Imprisonment from 6 months to 4 years, fine from 1.032 to 10.329 Euro. However, it would be hard to be imprisoned, not only for the possibility to *suspend the prison sentence* (Art. 656, comma 5, Criminal Procedure Code), but also for the *suspension of trial with probation* (Art. 168-bis Criminal Code).

b) *community service*, as a substitutional sentence for drug addict and user (granted for a maximum twice)

- This is one of the most spread offences, the aim of the provision is to detect small crime committed for drug pushing of low quality, amount and value.

**C) *Any crime committed in drug-addiction state or as habitual user of narcotic drugs and psychotropic substances (Art. 73, comma 5-ter):*** crime committed only once, with a sentence not exceeding 1 year of imprisonment (are excepted serious crimes, such as mafia ones, terrorism, murder, huge amounts of drugs, and others, see Art. 407, comma 2, Criminal Procedure Code)

**Penalties:**

a) *community service*, as a substitutional penalty (granted for a maximum twice)

**D) *Illegal transfers, placing on trade of narcotic drugs and psychotropic substances, with the authorization provided for in Art. 17 (Art. 73, comma 2).***

**Penalties:**

a) Table I and III (hard drugs) → imprisonment from 8 to 22 years, fine from 25.822 to 309.874 Euro

b) Table II and IV (soft drugs) → imprisonment from 2 to 6 years, fine from 5.164 to 77.468 Euro

**E) *Drug precursors: illegal placing on the market, importing, exporting, supplying, storing, fabricating, production, transforming, trading, distributing, intermediating (Art. 70) →*** imprisonment

**F) *Illegal Prescriptions (Art. 83):*** medical doctor or veterinarian who prescribes drugs for non-therapeutic use.

**Penalties:**

a) Table I and III (hard drugs) → imprisonment from 8 to 20 years, fine from 25.822 to 258.228 Euro

b) Table II and IV (soft drugs) → imprisonment from 2 to 6 years, fine from 5.164 to 77.468 Euro

**G) Conspiracy aimed to trafficking of narcotic drugs and psychotropic substances (Art. 74):**

**Penalties:**

- a) Promoting, establishing, managing, organizing or funding of the criminal association, with a minimum of structure → sentence not lower than 20 years of imprisonment
- b) Joining the criminal association → sentence not lower than 10 years of imprisonment
- c) Aggravating and mitigating circumstances:
  - In case of 10 or more members, as well as members who are drug users → sentence increased
  - In case of armed association → sentence not lower than 20/12 years of imprisonment
  - Cooperating in order to find evidence and subtract significant resources for crimes committing → sentence reduced by half to two-thirds
- d) *Corporate liability* (Art. 24-ter Legislative Decree No. 231/2001) → pecuniary and prohibitory sanctions

**H) Conspiracy: minor crime of tiny nature (so-called “Fatto di lieve entità”, Art. 74 comma 6), for means, courses or circumstances of action, for quality or quantity of drugs.**

**Penalties:**

- a) Promoters and founders → imprisonment from 3 to 7 years
- b) Members → imprisonment from 1 to 5 years

**I) Facilitation of drug using (Art. 79)**

1. Use of a public space or a private club as a place for drugs using, or allowing to do it.
2. Use of an immovable property, a suitable environment or vehicle as a place for drugs using, or allowing to do it.

**Penalties:**

- a) Table I and III (hard drugs) → imprisonment from 3 to 10 years, fine from 2.582 to 10.329 Euro

b) Table II and IV (soft drugs) → imprisonment from 1 to 4 years, fine from 2.582 to 25.822 Euro

c) Public commercial premises → sentence of closing from 2 to 5 years, ordered alternately by judicial authority, Prefect and the Italian Health Minister

d) Aggravating circumstances:

- Involving of minor → sentence increased by half to two-thirds

e) *Corporate liability* (Art. 24-ter Legislative Decree No. 231/2001) → sanction of definitive ban on activity

### **J) *Incitement, proselytism and encouraging of minors to crime (Art. 82)***

1. Public incitement to illegal use of drugs, proselytism activities, even though in private, and persuasion to the same use.

#### **Penalties:**

a) Table I and III (hard drugs) → imprisonment from 1 to 6 years, fine from 1.032,91 to 5.164,57 Euro

b) Table II and IV (soft drugs) → sentence reduced by half to two-thirds

c) Aggravating circumstances:

- Involving of minor, crime committed in or close to schools, youth communities, barracks, in prisons, hospitals, social service, healthcare services → sentence increased

- In case of crime committed against minor under 14 of age or patently incapable person, or if the offender is a caretaker → sentence doubled

### **K) *Mitigating circumstance (Art. 81)***

Helping and cooperating in order to avoid additional repercussions whenever facilitation of drug using caused death or personal injuries → sentence reduced by half to two-thirds

### **L) *Expulsion of convicted non-EU citizen (Art. 86)***

1. Automatic expulsion for some crimes, such as trafficking, conspiracy, facilitation, and incitement

2. Possible expulsion for the other crimes
3. Immediate expulsion *in flagrante delicto* for drug trafficking

### PERSONAL USE OF DRUGS IN ADMINISTRATIVE OFFENCES

Italian legislation recognizes the personal use of drugs as an administrative offence. This means that some conducts (for example, possession) may be shifted between the criminal and the administrative sphere depending on the action's purpose, namely if this is about business or on the contrary, recreational use. However, there is not a clear definition neither for *personal use*, nor for *trafficking*, so some hypothesis are still confused. In particular, in some cases **sharing** is punished like drug pushing, in other words conducts of drugs spreading are considered as criminal offences, even though implemented with the purpose of personal use, in spite of lack of any economic profit. Furthermore, doubts in interpretation derive also from **difficulties of proof** arising from the efforts to recognize the real aim of potential offenders.

Thus, in order to find out the restriction to *personal use* only of conducts are taken into account the criteria set forth in Art. 75, and the ones developed by case law.

#### a) Criteria in written law:

- *Amount of drug* under the threshold provided for in the ministerial decree (see Art. 78): however, Italian case-law has interpreted this standard as an index of the offensive capability for health, namely as a clue rather than an evidence. Accordingly, even the hypothesis above the quantitative threshold may be classified as an administrative offence whenever other circumstances occur symptomatic of personal use.

- Nature of drug's packaging, with regard to the overall gross weight or the break-up into packages.

- «Other circumstances of conduct».

#### b) Criteria in case-law:

- In attempting to take account of the *subjective circumstances* of the conduct, it has been developed a variety of index that prove the aim of personal use, such as the state of drug-addiction or abuse, the compatibility between drug possession and the economic conditions of the drugs user, the offender's behavior, and the relationship between drug supplier and user.

After a long academic discussion, Italian case law has recently classified the “*Group consumption*” of drugs (so-called “consumo di gruppo”) as a personal use every time possession and purpose are common for all the members of group who purchased the substance for everybody.

## ADMINISTRATIVE OFFENCES

### **A) *Illegal importing, exporting, purchasing, receiving in any capacity or possession of narcotic drugs and psychotropic substances, for personal use (Art. 75):***

- a) Table I and III (hard drugs) → administrative sanctions\* from 2 months to 1 year, ordered by the Prefect;
- b) Table II and IV (soft drugs) → administrative sanctions\* from 1 to 3 months, ordered by the Prefect;
- c) *Therapeutic and social rehabilitation program* or *educational and informational program*, may be ordered by the Prefect;
- d) *Security measures* (Art. 75-bis), such as daily attendance at the police office, mandatory return at home in the evening, prohibition from specified places frequenting for a maximum of 2 years, and prohibition from driving for a maximum of 4 years, etc., may be ordered by the Officer of the Ministry of Interior (so-called “Questore”);
- e) *Immediate withdrawal of driving license* by police stopping the concerned person driving;
- f) *Seizure of drugs* (Art. 85).

#### **\*Administrative sanctions:**

- suspension of *driving license* for a maximum of 3 years;
- suspension of *weapon license* for a maximum of 3 years;
- suspension of *passport* for a maximum of 3 years;
- suspension of *residence permit for tourism reason* for non-EU citizens.

### **B) *Drug precursors: illegal placing on the market, importing, exporting, supplying, storing, fabricating, production, transforming, trading, distributing, intermediating (Art. 70) → fine, suspension of license***

### **C) *Abandonment of syringes (Art. 77) → fine***



**D) Advertising of drugs (Art. 84)**, even though *indirectly* → fine

### STATE OF DRUG-ADDICTION

The condition of drug-addiction is certified by the competent *public* facilities, as well as the authorized *private* one. The *certification* of drug-addiction state is the prerequisite for granting of more favorable sentencing, such as for the minor crime of drug trafficking or conspiracy, as well as for the so-called persistent crime, and also for the alternative measures to detention. Indeed, both in trial and during execution of penalty, the certification of drug-addiction involves enforcement of the legal figure called *persistent crime* (so-called “reato continuato”) in order to significantly mitigate the penalty in case of multiple crimes committed within the same criminal plan (see Art. 671 Criminal Procedure Code).

*\*Regular verifications* on drug use shall to be carried out for workers who may jeopardize security and health of thirds, the specified categories are listed in the Decree of the Italian Ministry of Labour (Art. 125).

### EXECUTION OF SENTENCE

People convicted for committed crime in drug-addiction state have to serve the sentence in a suitable **treatment center** to carrying out therapeutic and social rehabilitation programs (Art. 95).

**A) Remand as a pre-trial detention** is excluded for crimes punished with imprisonment not exceeding 5 years (see new Art. 280 Criminal Code).

**B) Suspension of prison sentence** (Arts. 656, comma 5, Criminal Procedure Code, 47, comma 3-*bis*, Penitentiary Act) concerns crimes punished with imprisonment not exceeding 3 years, notably the minor crime of tiny nature in drug trafficking and conspiracy.

**C) Suspension of trial with probation** (Art. 168-*bis* Criminal Code) concerns crimes punished with imprisonment not exceeding 2 years, notably the minor crime of tiny nature in drug trafficking and conspiracy. This measure may be granted just once. Penalties and related effects *are extinguished* after a period laid down by the Court.

#### **D) *House arrest in therapeutic facility (Art. 89)***

Under the specified conditions of remand and if there are not precautionary requirements, the court orders the house arrest in a therapeutic facility for drug and alcohol addicts who are underway in therapeutic program or who intend to do it. This measure is subject to the therapeutic program carrying out, and the acceptance by the concerned therapeutic facility; it may be revoked by the court. House arrest is precluded for the crimes provided for in Art. 4-*bis*, Law No. 354/1975.

#### **E) *Suspension of prison sentence***

1. The Italian Supervision Court (“Tribunale di Sorveglianza”) may suspend the prison sentence for 5 years and the related measures, if the concerned person has successfully carried out a therapeutic and social-rehabilitation program in a public or an authorized private facility. This measure is subject to the *certification* released by the competent therapeutic facility. The suspension of execution is granted only once, and just for prison sentences, not exceeding 6 years or 4 years for crimes provided for in Art. 4-*bis*, Law No. 354/1975. (Arts. 90, 91).

2. The Italian Supervision Court may suspend also the *pecuniary sanction* for the concerned person in economic hardship in order to avoid the failure of treatment before a debt difficult to pay.

3. Penalties and related effects *are extinguished* after 5 years (or after a period laid down by the Court) if the concerned person has not been convicted for other crimes punished with imprisonment; otherwise, *the suspension is revoked* (Arts. 92, 93).

#### **F) “*Therapeutic*” probation (Art. 94)**

1. Drug and alcohol addicts who are underway in a rehabilitation program or who intend to do it may ask for the so-called “therapeutic” probation to continue or undertake a therapeutic activity. The “therapeutic” probation is granted only in the cases of prison sentence not exceeding 6 years.

2. The Italian Supervision Court (“Tribunale di Sorveglianza”) may grant the “therapeutic” probation *provisionally*.

3. Once the therapy is successfully completed, the Italian Supervision Court may convert the “therapeutic” probation in the *ordinary* one, regardless the related requirements.

- Double requirement for double purpose

Although probation provided for in Art. 94 was set forth for therapeutic function, in Italian case law, it results to be granted not only with detoxification purpose, but also for re-education and re-

socialization. This means the courts allow such a measure on the grounds of both *aptitude for the treatment* for drug-addiction and *offender's personality* and *risk of recidivism*.

**G) *Social assistance and health care for detainees* (Art. 96)**

1. Detainees and people in remand who are drug-addicts or habitual users of drugs have the *right to medical care and assistance* into the prisons with rehabilitation purpose.

2. The *local healthcare authorities* (the so-called *ASL, Azienda Sanitaria Locale*) provide medical care and rehabilitation of drug and alcohol addicted detainees, in agreement with prison administrations and internal health care services. Indeed, in 2008 all the functions concerning healthcare in prison were transferred from the Ministry of Justice to the Italian National Healthcare Service (the so-called SSN, Servizio Sanitario Nazionale).

3. *Special suitably equipped wards* are organized in prisons on a territorial basis by the Italian Ministry of Justice.

4. Directors of prisons have to report detainees released who still need care and assistance to the competent regional medical centers.

5. Prison Administration is charged with the maintenance, care and medical assistance of the person house arrested in private authorized structures.

6. The Juvenile Justice Department is charged with medical and social rehabilitation program of *minors* who are drug-addicts or habitual users, up to a maximum of 2.000.000 Euro.